A.F.R.

HIGH COURT OF CHHATTISGARH: BILASPUR
S.B. HON'BLE SHRI VIJAY KUMAR SHRIVASTAVA, J
MISCELLANEOUS APPEAL NO.1113 OF 2004

Appellant :
Non-applicant No. 3

Smt Neera Bai,
aged 38 years,
W/o Shri K.K.Yadav,
R/o. near the house of Smt Ramoutin Veram (lodhi), Sikola, ahead to Prem Nagar, "Bhim Nagar", Durg.

Vs.

Respondents:
Applicant

1) Shri KK Yadav,
S/o. Late Dileshwar Prasad Yadav, aged about 47 years, occupation-Additional Assistant Class-I, Electricity Board, Durg R/o. Kela Badi, Near Trilochan Bal Mandir, Durg, Tahsil and District Durg (CG).

Non-applicant No.1

2) Praneet Kumar Yadav, S/o KK Yadav, aged about 13 years, through guardian Shri K.K. Yadav, R/o Kela Badi, Near Trilochan Bal Mandir, Durg, Tahsil and District Durg (CG).

Non-applicant No.2

3) Ku. Srujeta Yadav, D/o KK Yadav, aged about 12 years, through guardian mother Smt. Neera Bai, R/o. near the house of Smt Ramoutin Veram (lodhi), Sikola, ahead to Prem Nagar, "Bhim Nagar", Durg.

PRESENT:
Shri Abhay Tiwari, counsel for the appellant.
Shri Alok Bakshi, Counsel for respondents No. 1 & 2.
None for respondent No.3.

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ORDER
(Dated 13th January 2006)

This appeal has been directed against the order dated 18/10/2004 passed by VII Additional District Judge (FTC) Durg, in M.J.C.No.130/2004 whereby the application filed by respondent/applicant K.K.Yadav for custody of non-applicant No.2 has been allowed with a direction to the appellant to deliver non-applicant No.2 Kum Srujeta Yadav into custody of applicant/respondent No.1.

2) Facts admitted are that respondent/applicant K.K. Yadav is the father of Praneet Kumar Yadav and his mother is appellant Smt. Neera Bai who left the house of KK Yadav along with her son-Praneet Kumar Yadav and daughter-Srujeta Yadav and started living separately.

3) KK Yadav filed an application for appointment of guardian and seeking custody of his both children stating that Praneet Kumar Yadav and Srujeta Yadav were born on 30.04.1989 and 26.10.1990 respectively out of illicit relation with Smt. Neera Bai. Smt. Neera Bai was living with KK Yadav along with both the children. On 19.04.2002, she left the house in his absence along with both the children. Presently she is living at Kasardih Durg. She has no means of livelihood and is unable to maintain both her children. Therefore,

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she filed an application under Section 125 of the Cr.P.C. in the Court of Judicial Magistrate First Class, at that time Praneet Kumar Yadav was studying in Class 8th and Ku Srujeta Yadav was studying in Class 7th. Respondent K.K. Yadav being father of the children, can take care of his both the children. During pendency of the application, Praneet Kumar alleging that Smt Neera Bai is living in adultery, left her house and started living with his father KK Yadav. The application was opposed by Smt. Neera Bai, and her children. In their reply they stated that both the children took birth as a result of legitimate marital relation. KK Yadav himself threw her from his house. Therefore, she filed an application for maintenance under Section 125 of the Cr.P.C. Both the children are minors and want to live with their mother.

4) Both the parties adduced documentary and oral evidence in support of their case. KK Yadav himself and his son Praneet Kumar Yadav were examined to prove the case and in rebuttal non-applicant, Smt Neera Bai examined herself and her daughter Srujeta. Learned trial Court after appreciating the evidence held that the reason for leaving the house of KK Yadav is on account of immoral conduct of Smt. Neera Bai which caused tension and dispute. K.K.Yadav is natural guardian of both the children and in comparison to appellant/non-applicant No.3 - Smt. Neera Bai, the welfare of both the minor children can be maintained in his custody.

5) Learned counsel for the appellant contended that in the proceeding under Section 125 of the Cr.P.C., the Court of Judicial Magistrate First Class has held Smt. Neera Bai as wife of KK Yadav; Praneet Kumar Yadav and Srujeta Yadav as their legitimate children. However, disallowed maintenance to Smt. Neera Bai on the ground that she has willfully deserted her husband. In revision filed by K.K. Yadav, the Sessions Court up-held the order passed by the Judicial Magistrate First Class. To avoid maintenance to wife and children, application for grant of maintenance under Section 125 of the Cr.P.C., has been opposed on various false allegations by KK Yadav. Financial capacity alone is not sufficient to decide welfare of the children that too against their consent. Per contra, learned counsel for the respondents No. 1 and 2 argued that during pendency of the application Praneet Kumar Yadav left his mother's place, and has joined the company of his father. Ku. Srujeta Yadav is a minor girl, aged about 13-14 years and is unable to tender valid consent; therefore, her willingness has no force. Smt. Neera Bai has no property and means of livelihood. Although the contention of KK Yadav in Magisterial Court regarding adultery has been dispelled, yet she is leading immoral life, therefore, for the welfare of Ku. Srujeta Yadav, learned trial Court rightly passed the order of custody and guardianship in favour of applicant K.K. Yadav. In support of his argument, he relied upon the judgments rendered by the Apex Court in Dr Mrs. Veena Kapoor Vs Varinder Kumar Kapoor, reported in

AIR 1982 SC 792 and **Mrs Elizabeth Dinshaw Vs Arvand M. Dinshaw and another**, reported in AIR 1987 SC 3.

6) Section 17 of the Guardians and Wards Act 1890 reads as below :-

> *"Matters to be considered by the Court in appointing guardian - (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.*
>
> *(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.*
>
> *(3)If minor is old enough to form an intelligent preference, the Court may consider that preference.*
>
> *(4) [***]*
>
> *(5)The Court shall not appoint or declare any person to be a guardian against his will."*

7) Although for custody and guardianship paramount consideration is the welfare of minor, but his preference if he is old enough and intelligent is also required to be respected. Set apart, the Court has to consider the age, sex, religion, capacity, character of the proposed guardian and his nearness with the minor. Learned Court

below in deciding the case did not care to weight the preference given by minor and it appears that the Court is influenced with the contention that the mother Smt. Neera Bai is leading an immoral life.

8) So far as adultery or immoral life led by Smt. Neera Bai is concerned, respondent/applicant KK Yadav did not specifically plead in his petition about adultery or immoral life of his wife. It is not disputed during the argument that the question of adultery has already been raised in the Criminal Court by KK Yadav and the same was dispelled by the Court of Judicial Magistrate. In the instant case, for want of specific pleading neither the evidence regarding adultery or immoral life could have been allowed to adduce nor decision on that point could have been passed by the Court. Set apart, in the instant case no independent evidence to prove or rebut the immoral character of mother Neera Bai has been adduced by any of the parties.

9) Praneet Yadav when left the custody of his mother and started living with his father, has started saying that Smt. Neera Bai is living in adultery and has deposed against her on 01.05.2004. His evidence has been specifically contradicted by Neera Bai (NAW-1) and her daughter Srujeta Yadav (NAW-2), who lives with her mother. Therefore, without pleading and when the evidence of Praneet Yadav has been contradicted by his mother Neera Bai and sister Srujeta Yadav, no opinion could have been formed to the effect that she is

leading immoral life. Set apart, Criminal Court has already decided the question and has dispelled the same.

10) Ku. Srujeta Yadav was born on 26.10.90. Her evidence has been recorded on 01.05.2004 by that time, she was aged more than 13 years who declared her preference that she wants to live with her mother. During pendency of the appeal, on 25.02.2005 also in person, parties were present but Ku. Srujeta Yadav did not change her preference. On 25.02.2005, she was aged more than 14 years. It is not disputed that she is studying. When the application was filed in the year 2003, she was studying in Class 7th and when her evidence was recorded, certainly she must be reading in higher classes. Therefore, the girl aged about 13 - 14 years who is also educated who intelligently gave statement in the Court is certainly old enough to declare her preference. Therefore, it is necessary that the Court before passing any order should have considered her preference, which learned Court below failed to do.

11) Ku. Srujeta Yadav is a girl. She is living with her mother, who is at present taking care of her. Her age is between 13 to 15 years. This is the age when physical and biological changes appear and a female sex requires companion of the same sex. In this age, that too in Indian culture it is not possible to share her difficulty by her father or brother.

12) Financial weakness alone has no impact to determine the suitability of guardian. If for the sake of consideration, it may be accepted that Smt. Neera Bai has no means of livelihood;,in that case, under the law, for the welfare of children, father of the children can be compelled to provide suitable amount. In the instant case, by order of the Magisterial Court, KK Yadav is paying Rs.1500/- as maintenance to Ku. Srujeta Yadav. Kum Srujeta Yadav in her cross-examination clearly stated that whatever amount is allowed by the Court, their expenses are being met with that. Only at the time of admission, fees amount of Rs.300/- is to be paid and at the time of examination, a sum of Rs.35/- is being paid. Therefore, from her statement, it is evident that they are keeping well by the amount paid by respondent/applicant KK Yadav towards maintenance to Ku Srujeta Yadav.

13) KK Yadav in his evidence deposed that she kept Smt. Neera Bai. Earlier to that, she had three or four husbands. She is character-less. But in the instant case, all these allegatios have not been proved. Therefore, it is clear that KK Yadav is making false charges not only against his wife but also against his son and daughter by declaring them to be illegitimate.

14) It is evident that although KK Yadav is father of Ku. Srujeta Yadav, but he without any proof is leveling scandalous charges

against Smt Neera Bai, mother of Ku. Srujeta Yadav and also declaring Ku. Srujeta Yadav his illegitimate daughter. Ku. Srujeta Yadav who aged about 13 to 15 years, has to face physical and biological changes, therefore, at this juncture, father K.K. Yadav cannot share the difficulties and feelings of Ku. Srujeta Yadav. When Smt. Neera Bai left the house of K.K. Yadav along with her son and daughter, he did not care to maintain them. When Smt Neera Bai filed an application under Section 125 of the Cr.P.C., compelling him for maintenance, thereafter, only in compliance of the order of the Court, he started paying maintenance to Ku. Srujeta Yadav. It is also evident that to create pressure on Smt. Neera Bai to forbid the claim of maintenance, this application appears to have been filed so that in case custody of Ku. Srujeta Yadav is handed over to him, he will be relieved from paying maintenance to her.

15) Taking into consideration the character of KK Yadav, his sex and the intelligent preference given by Ku. Srujeta Yadav, he was not suitable in comparison to Smt Neera Bai, who is mother of Ku. Srujeta Yadav for appointment of guardian. Smt. Neera Bai is mother of Kum Srujeta yadav and is living with her since her birth till now i.e. around 14-15 years. It has not been proved that she is living in adultery or is leading an immoral life. At this juncture, she is the best companion to her daughter Ku. Srujeta Yadav, who has to face physical and biological changes. So far capacity is concerned, she is

receiving maintenance for Ku. Srujeta Yadav. In case any more amount for welfare of the children is required, she can recover the same from KK Yadav by legal process. Therefore, for the welfare of the child Smt. Neera Bai, in whose custody Ku. Srujeta Yadav is living is perfectly suitable in comparison to applicant K.K. Yadav.

16) In the result, the appeal succeeds. The order passed by the trial Court is set aside.

17) Cost of this appeal shall be paid to the appellant by the respondent No. 1.

Sd/-
V.K. Shrivastava
Judge

padma